(d) interest on the Judgment amount calculated at 6% per annum from the date of judgment to date of realisation of Judgment;

(e) costs of this suit.

Claim allowed.

Solicitors: *Jegathesan & Co.; H.S.Lim & Co.*

LIM WIE TEE v. KOH HENG JIN & ORS.

[O.C.J. (B.T.H. Lee J.) July 17, 1980]

[Kuala Lumpur – Originating Motion No. F 28 of 1979]

Land Law – Private caveat – Allegation of contract of sale – Affidavits inconsistent with allegation – Whether her caveat should be discharged.

The applicant had lodged a private caveat against the land, the subject of an alleged contract of sale, on the ground that there was a contract of sale between him and the respondents. On an application by the respondents to have the caveat removed

Held: the affidavits of the applicant showed that the applicant had put himself into a situation quite inconsistent with his assertion on the one hand that there was a contract and on the other which was directly in conflict with his assertion, he having made allegations of fraud, mistake, misrepresentation and illegality. The caveat must therefore be removed.

Editorial Note: Upon appeal to the Federal Court (Federal Court Civil Appeal No. 182 of 1980) no order was made but an early trial of the Originating Motion was ordered.

Cases referred to:

(1) *Eng Mee Yong & Ors.* v. *V. Letchumanan* [1979] 2 M.L.J. 212 P.C.
(2) *Hussey* v. *Horne-Payne* (1879) 4 App. Cas. 311.
(3) *Tham Kong* v. *Oh Hiam & Ors.* [1968] 1 M.L.J. 44; see [1980] 2 M.L.J. 159.
(4) *Hillas & Co. Ltd.* v. *Arcos Ltd.* [1932] All E.R. Rep. 494.
(5) *Nicolene Ltd.* v. *Simmonds* [1953] 1 All E.R. 822
(6) *Perry* v. *Suffields Ltd.* [1916] 2 Ch. 187.
(7) *Winn* v. *Bull* (1877) 7 Ch. Div. 29.
(8) *Von Hatzfeldt-Wildenburg* v. *Alexander* [1911-13] All E.R. Rep. 148.

CIVIL SUIT.

Ong See Seng for the applicant.

Lim Kean Chye for the respondents.

Cur. Adv. Vult.

B.T.H. Lee J.: This is an application by way of Notice of Motion for an order that the Order of the High Court dated 5.11.1979 obtained by the Applicant be set aside and that the private caveat registered as No. 659/78 Vol. I Folio 135 on land held under Geran No. 19446 Lot No. 6659 Mukim Kajang be removed forthwith.

The right of a person to lodge a caveat under the National Land Code (hereinafter referred to as "the Land Code") has been discussed in the case of *Eng Mee Yong & Ors.* v. *V. Letchumanan*(1) in which the Privy Council held:

> "The onus was on the caveator to satisfy the court that on the evidence presented to it his claim to an interest in the property did raise a serious question to be tried."

The letter of offer from the co-owners, omitting the irrelevant parts, is as follows:–

> "We offer to sell you and or your nominee/s the above property free from all encumbrances and with vacant possession at the purchase price of Ringgit Twenty Thousand ($20,000/–) only per acre computed to value at Ringgit Five Million, Eight Hundred and Ninety Thousand ($5,890,000/–) only and upon the following terms:–
>
> 1. This offer is given for valuable consideration and is valid and irrevocable up to October 15, 1978.
>
> 2. The purchase price is to be paid in cash upon execution of transfer of the said property.
>
> 3. Sellers Commission of one percent (1%) of the purchase price to be payable to brokers through you.
>
> 4. All taxes, including Real Property Gains Tax, if applicable, shall be retained by Solicitors.
>
> 5. Other usual terms of such sales to be incorporated in a Sales Agreement upon acceptance of this offer and upon your payment of a sum of Ringgit Twenty Thousand ($20,000/–) only in cash, refundable forthwith in the event that our offer to sell you the above property is unacceptable by you and or your nominee/s."

It is reasonably plain that the letter of offer is not the contract. It was originally an offer by various co-owners to a family company, Koh Hooi Cheow Realty Sendirian Berhad. As the Respondents' affidavits in support show, the contract which was made between the Applicant and the Respondents, is made up of the said letter of offer, the conversations between the parties and their lawyers, and the correspondence. It is this whole evidence that must be looked at to see what the contract is between the parties.

I may usefully quote the following passage from *Chitty on Contract*, 24 Ed., Vol. I, at page 48 under the heading "Incomplete Agreement":

"Para 99 – Agreement in principle only

Parties may reach agreement on broad matters of principle, but leave important points unsettled so that their agreement is incomplete. ..."

and

"Para 100 – Stipulation for the execution of formal document.

The question whether the parties have reached a complete agreement frequently arises where there has been an agreement in general terms but the parties have stipulated for the execution of some further formal document ..."

See *Halsbury's Laws of England,* 3rd Ed., Vol. 8, page 77 – para 131, which sums up the position as follows:

"The whole of the correspondence or documents must be considered, and a document which, taken alone, appears to be an absolute acceptance of a previous offer does not make the contract binding if, in fact, it does not extend to all the terms under negotiation, including matters appearing from oral communication."

and at page 78:

"Moreover two letters which at first sight appear to be an offer and an acceptance will not constitute a contract if it appears from subsequent negotiations that important terms forming part of the contract were omitted from those etters. – *Hussey* v. *Horne-Payne*[2]."

Counsel for the Applicant relied on the decision in *Tham Kong* v. *Oh Hiam & Ors.*[3] for the proposition that there is no mistake as to the subject matter under sale.

I desire to say at the outset that the facts of *Tham Kong's* case were so different to those before this court that it is unnecessary to go into them in great detail beyond saying that it dealt with a completely different situation. In the former case, the mistake, if at all it was one, was not such a fundamental mistake. I do not find anything in the case which can be of assistance to the Applicant.

Several decisions, including those of *Hillas & Co. Ltd.* v. *Arcos, Ltd.*[4] and *Nicolene, Ltd.* v. *Simmonds,*[5] were cited by counsel for the Applicant in support of the argument that the letter of offer contains all the fundamental terms necessary to effect a sale of the subject matter. He further says it is not an agreement merely to negotiate a contract.

The facts in *Hillas* were different and the question there considered was that a contract which is intended to be binding may however be enforceable even though certain terms can be ascertained by implication. The particulars of option were not defined, but the intention of the parties could be ascertained from commercial usage so that there was a concluded contract. In the case of *Nicolene,* the defendant there wrote a letter accepting the offer; the letter contained, *inter alia,* the words, "I assume that ... the usual conditions of acceptance apply". Since there were no such "usual conditions" and there is nothing to which the clause could apply, it was meaningless and being clearly severable from the rest of the contract, and capable of being rejected without impairing the sense or reasonableness of the contract as a whole, it should be rejected; the defendant's letter of August 16, constituting an unqualified acceptance of the plaintiff's offer; and therefore there was a concluded agreement between the parties.

Those decisions, in my view, have very little bearing on the question now before me.

See also *Perry* v. *Suffields, Limited*[6] where Cozens-Hardy M.R. explains why the whole has to be looked at.

The circumstances in those cases show in the instant case that there was no contract formed.

Another aspect of the case before this court falls for observation. The Respondents/Plaintiffs by way of Summons-in-Chambers dated March 28, 1979, applied for an order pursuant to Order 14A for specific performance of the contract.

The Applicant/Defendant in a letter dated January 2, 1979, alleged misrepresentation and fraud and that he could not be forced to specifically perform. Para 2 of the letter reads:

"2. From the aforesaid letter and the statements made at a meeting in our office on December 22 last by your client Mr. Koh Heng Jin and your Mr. K.S. Tan, we form the view that there was a deliberate act to fraudulently misrepresent the factual position of Lot 6659 to our client. ..."

It is however contended by the Respondents that they had been misled into thinking that the land sold was not estate land within the meaning of the Land Code. It is convenient at this stage to set out the relevant provisions of section 214A of the Land Code:

"214A. (1) Nothwithstanding anything contained in this Act, no estate land is capable of being transferred, conveyed or disposed of in any manner whatsoever, to two or

more persons unless approval of such transfer, conveyance or disposal has first been obtained from the Estate Land Board (hereinafter referred to as 'the Board') established under subsection (3)."

"(2) The Registrar shall not register any instrument of transfer of such land under Part Eighteen of this Act unless such instrument is accompanied by a certificate of approval granted by the Board."

"(4) The proprietor or any co-proprietor of any estate land desiring to transfer, convey or dispose of in any manner whatsoever such land to two or more persons shall together with such persons jointly submit an application to the Board in Form 13C."

"(10A) (b) For the purposes of this sub-section, the execution of an agreement to convey or dispose of the whole of an estate to two or more persons, or to convey or dispose of any portion or portions of an estate land to one or more persons, without the approval of the Board, shall be conclusive proof that the estate land is conveyed or disposed of in contravention of subsection (1); and any act to demarcate an estate land or to cause or permit the demarcation of an estate land otherwise than in accordance with the provisions of this Act shall be *prima facie* proof that the person so acting, causing or permitting attempts to transfer, convey or dispose of the estate land in contravention of subsection (1)."

"(11) For the purpose of this section 'estate land' means any agricultural land held under one or more than one title, the area or the aggregate area of which is not less than 500 acres and the lots constituting such area are contiguous."

From the above, there can be no doubt that whether land is estate land or not is fundamental.

Mistake

It was contended by counsel for the Applicant that even if it is held there is a mistake, it can only be an unilateral mistake (see section 23 of the Contracts Act, 1950 – Act 136).

Mistake may mean lack of *consensus ad idem*. *Stonham on The Law of Vendor and Purchaser* has this to say on Mistake at page 6:

"7. *Consensus ad idem* also involves the concept that there should not be mistake of a fundamental nature excluding the reality of a true consent. Where the mistake is not of a fundamental nature, although not preventing the formation of a contract, it gives rise to various rights some legal, others equitable."

Illegality

The Applicant has also raised the question of illegality. Paragraph 14 of the Applicant's/Defendant's solicitor's affidavit dated 17.5.79 reads:

"14. It does seem that the 1st Plaintiff has committed an offence under section 214(10A)(a) of the National Land Code – which paragraph the 1st Plaintiff seems to have deliberately omitted in paragraph 6 of his Affidavit deposed on March 27 1979.

Section 214(10A)(a) reads:

"Any person who transfers, conveys or disposes of or attempts to transfer, convey or dispose of in any manner whatsoever, any estate land in contravention of sub-section (1), shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than one year and not more than three years and to a fine not exceeding ten thousand dollars.' "

It is perhaps not without some importance to notice that either of these arguments, i.e. Mistake and/or illegality defeats the claim that there was a contract.

On the question of illegality, if the letter of offer and subsequent negotiations of the draft agreements, or if all these taken together, constitutes an "attempt" as set out in section 214 (10A)(a) of the Land Code, then it follows that the alleged agreement would be unenforceable.

The next argument against a contract is the letter of offer. It is relevant to note that it provides for a further contract to be signed (see para 5 of the letter of offer) which reads:

"5. Other usual terms of such sales to be incorporated in a Sales Agreement ....."

The letter of offer together with the subsequent conversations and correspondence show that a further contract was to be signed between the parties. See *Stonham on Vendor and Purchaser at page 23:*

"Whether Contract Concluded is Question of Construction and Circumstances.

33. Sometimes an agreement between the parties is so phrased as to contemplate that another document is to be entered into and signed by the parties. In such a case, it is a question of construction, in the light of all the surrounding circumstances, whether the parties have agreed upon all the terms of the contract, and merely desire the agreement to be expressed in more formal language; or whether the execution of the further document is a condition precedent to the creation of any contractual obligations, and, thus, whether the parties are still in negotiation each with the other and further terms have yet to be decided upon or accepted."

Reference may be made to *Winn* v. *Bull*[7] where by a written agreement the Defendant agreed with the Plaintiff to take a lease of a house for a certain term at a certain rent, "subject to the preparation and approval of a formal contract".

No other contract was ever entered into between the parties. It was there held that there was no final agreement of which specific performance could be enforced against the Defendant.

Similarly in the case of *Von Hatzfeldt-Wildenburg* v. *Alexander*[8], it was held that "it is a question of construction whether the execution of a further contract is a condition or term of the bargain, or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case, there is no enforceable contract either because the condition is unfulfilled or because the law does not recognise a contract to enter into a contract."

The affidavits of the Applicant show, so it seems to me, that the Applicant has put himself into a situation quite inconsistent with his assertion on the one hand that there was a contract, and on the other which is directly in conflict with his assertion, the general allegations of fraud, mistake, misrepresentation and illegality.

Having considered the matter carefully, and upon the authorities, I am of the opinion that the Respondents are entitled to an order in terms of their prayers in the Notice of Motion, and I order that the caveat entered by the Applicant be removed with costs to the Respondents.

Order accordingly.

Solicitors: *Mah-Kok & Din; Syarikat K.S. Tan*

S. THAIYALNAYAGAM v. G.M. KODAGUDA

[O.C.J. (Wan Hamzah J.) March 26, 1982]
[Kuala Lumpur – Originating Summons No. F 357 of 1980]

Family Law – Custody – Parents of children deceased – Claim by grandmothers of children – Welfare of infants – Wishes of infants – Religion of parties – Guardianship of Infants Act, 1961

In this case the father of the children had died in a car accident and their mother had been murdered. The maternal grandmother applied for an order of adoption of the children and an interim order was made for her to have custody of the children for six months. The paternal grandmother applied to intervene in the adoption proceedings and obtained an order for access. She subsequently brought an application for custody of the children to be given to her. Both the adoption application and the custody application were heard together. The learned Judge dismissed the application for adoption and considered the question of custody. He interviewed the children, who expressed a wish to live with the maternal grandmother.

Held: (1) in this case both the grandmothers can give love and affection to the children and they are well off financially so as to be able to provide for maintenance for the children and their education. The children would however be happier to live and be looked after by the maternal grandmother for the reasons given by them;

(2) on the facts the home of the maternal grandmother would be more conducive to their welfare than the house of the paternal grandmother;

(3) there was no evidence that it was the wish, of the children's parents that they be guided in the Hindu religion. The evidence was that the mother was a Roman Catholic and had undertaken to bring up the children in the Roman Catholic faith;

(4) in the circumstances the maternal grandmother should continue to have custody of the children.

ORIGINATING SUMMONS.

Miss C.H. Liew for the applicant.
Manjeet Singh for the respondent.

Cur. Adv. Vult.

Wan Hamzah J.: This is an application by S. Thaiyalnayagam d/o Sinnakutty (to whom I shall refer as Madam Thaiyalnayagam) for an order of custody of the following infants:–

(a) Danendra Sinnappa.
(b) Rohini Sinnappa.
(c) Malini Sinnappa.

These infants are the children of Sinnappa Sivapakiam and Jean Philomena Perera. Sinnappa Sivapakiam was the son of Madam Thaiyalnayagam, and he died in a car accident on January 1, 1978. Jean Philomena Perera was murdered on April 6, 1979 and she was the daughter of the Respondent, Gertrude Mabel Kodagoda alias Mabel Perera (to whom I shall refer as Madam Kodagoda). Therefore both Madam Thaiyalnayagam and Madam Kodagoda are grandmothers of the infants the subject matter of this application.

It would be useful to state briefly the history of the proceedings in the court relating to the infants. In May 1979 Madam Kodagoda filed an application for an order of adoption of the three infants, vide Adoption Application No. 4 of 1979. On May 18, 1979 Azmi J. made an interim order for Madam Kodagoda to have custody of the